In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-716

MORGAN N. MADDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a decision of the United States Court of Appeals for the Tenth Circuit denying petitioner recovery against the United States under the Federal Tort Claims Act.

In November 1968, the Department of the Army entered into a construction contract with the Allied Plumbing and Heating Company (Allied) for the purchase and installation of five heating units for the Tooele Army Depot, Tooele, Utah. Allied subcontracted a portion of the work to petitioner's employer, Campbell & Robinson Construction Company. In connection with this subcontract, petitioner was assigned by his employer to work on rigging to hoist equipment to the top of a depot building. A United States Army Safety Officer observed petitioner working more than 35 feet above the ground without safety nets, lines, or

planking, in violation of federal and state regulations, and he brought this to the foreman's attention and the foreman agreed to correct the situation. The situation was not corrected, however, and several hours later petitioner fell and sustained a serious injury to his right shoulder.

Petitioner then brought this suit in the United States District Court for the District of Utah pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346, alleging negligence on the part of the United States. The United States, in turn, filed a third-party complaint against Allied. Following a trial the district court found that the government had retained and exercised control over the work performed by the contractor and that its safety officer had been negligent in failing to remain in the area to see that an unsafe and dangerous working condition was corrected. The court concluded that the United States was liable to petitioner for $66,307. The court further found that Allied had failed to meet its contractual duty of ensuring that adequate equipment would be provided for the employees of its subcontractor and therefore that Allied was liable to the government for the full amount awarded to petitioner.

The United States and Allied both appealed. The court of appeals reversed the award of damages to petitioner on the ground that under local Utah law, as interpreted in *United States* v. *Page*, 350 F.2d 28 (C.A. 10), certiorari denied, 382 U.S. 979, the government had no control over, or duty to, the subcontractor's employees. For that reason, the court also reversed the award of damages against Allied.

Petitioner's sole contention is that the court of appeals incorrectly interpreted Utah law on the question of a contractee's duty to a subcontractor's employees. However, as petitioner concedes (Pet. 4), the Utah Supreme Court

has never ruled on that issue. In deciding *United States* v. *Page, supra,* the court of appeals reviewed local law and concluded that Utah did not make a contractee responsible for the safety of his contractor's employees (350 F.2d at 33-34):

> The general law on the subject casts serious doubts as to whether the doctrine of nondelegable duty as here involved applies to injuries to employees of the independent contractor. * * * The Utah Supreme Court apparently has not been faced directly with this question, but the view taken by the courts in the above cited cases [that there is no duty] is supported by dictum in *Dayton* v. *Free,* 46 Utah 277, 148 P. 408, and nothing to the contrary has been advanced.

Petitioner alleges (Pet. 4) that the reasoning of several Utah decisions supports a contrary interpretation of Utah law. Those decisions, however, all antedate *Page.* Consequently, the court of appeals was justified in following its own decision in *Page.* The question of the reasonableness of the court's interpretation of Utah law does not warrant review by this Court.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[1]Petitioner offers no support for his contention (Pet. 5) that Utah law is identical to that of California and Florida. Thus there is no basis for his claim that the decision below conflicts with *Thorne* v. *United States,* 479 F.2d 804 (C.A. 9) (interpreting California law), and *Orr* v. *United States,* 486 F.2d 270 (C.A. 5) (interpreting Florida law).